85-1848 (1)

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October, 1985 Term

FRED A. KOEHLER, Petitioner, vs. ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation, Respondent.	)	On Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1985 TERM

NO._____

FRED A. KOEHLER,

Petitioner

vs.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT
OF THE UNITED STATES

Petitioner, Fred A. Koehler, herein applies, pursuant to the provisions of Section 1257, Title 28, United States Code and Rule 17 and Rule 21 of the

Supreme Court Rules, for a writ of certiorari to review the judgment of the Supreme Court of Illinois entered the 20th day of December, 1985, affirming the judgment of the Fifth District Appellate Court concluding that a railroad employee covered under the provisions of the Railway Labor Act, 45 U.S.C. §151 et seq., is preempted from an action in state court against his employer for retaliatory discharge.

I

QUESTION PRESENTED FOR REVIEW

Whether a railroad employee covered under the provisions of the Railway Labor Act, 45 U.S.C. §151 et seq., is preempted by the jurisdiction and procedure under said Act from a tort action in state court against his employer for retaliatory discharge.

II

TABLE OF CONTENTS

Question Presented for Review.....2

Table of Contents.....3

Table of Authorities.....3

Opinions Below.....5

Jurisdiction.....6

Constitutional and Statuatory Provisions Involved.....6

Statement of Facts.....7

Reasons for Granting the Writ.....14

Certificate of Service.....34

Entry of Appearance.....36

III

TABLE OF AUTHORITIES

Andrews v. Louisville Nashville Railroad Co., 1972, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed. 2d 195 (1956).....28,29

Belknap v. Hale, 462 U.S. 591, 103 S.Ct. 3172 (1983).....14,15

Dahlberg v. Pittsburg and L.E.R. Co. 138 F.2d 121 (3rd Cir. 1943).....23

Energy Reorganization Act, 42 U.S.C. Sec. 5851 (1982).....27,28

Farmer v. Brotherhood of
Carpenters, Local 25, 430 U.S.
290 97 S.Ct. 1056, (1977).....14,16,17

Federal Employer's Liability Act
45 U.S.C. §51 et seq.....7,26,30

Garibaldi v. Lucky Food Stores, Inc.
726 F.2d 1367, 1372-73 (9th Cir.)
(1984).....15,17-19,21

Illinois Supreme Court Rule 308(a).....8

Jackson v. Consolidated Rail Corp.
(7th Cir. 1983) 717 F.2d 1045.....28-31

Kelsay v. Motorola, Inc.,
74 Ill.2d 72, 384 N.E.2d 353,
23 Ill.Dec. 559 (1978)....19,20,27,30,31

Magnuson v. Burlington Northern,
576 F2d 1367, (9th Cir.).....25

Midgett v. Sackett-Chicago,
Inc. 85 Ill.Dec. 475,
473 N.E.2d 1280
105 Ill.2d 143 (1984).....12,21,22,26,27

Mouser v. Granite City Steel Div.
(1984) 121 Ill.App.3d 834.....11

National Labor Relation Act,
219 U.S.C. 151 (1982).....15

Palmateer v. International
Harvester Co., 85 Ill.2d 124,
421 N.E.2d 867, 52 Ill.Dec. 13
(1981).....22,23

Railway Labor Act, 45 U.S.C.
§151 et seq.....2,6-10,12,13,
.....28,29,31,32

Raybourn v. Burlington Northern
Railroad Co., 602 F.Supp. 395
(1985).....23-25

Southern-Pacific Co. v. Joint
Counsel of Dining Car Employees
165 F.2d 26 (9th Cir. 1947).....23

Wheeler v. Catepillar Tractor
Co. 85 N.E.2d 372,
92 Ill.Dec. 561 (1985).....26,27

Worker's Compensation Act,
Ill.Rev.Stat. Chap 48, 138.1
et seq. (1983.....19

IV

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported, 488 N.E.2d 542, 94 Ill.Dec. 543, (1985). The Order denying petitioner's request for a rehearing entered the 4th day of February, 1986, is set forth in full in the appendix.

The opinion of the Fifth District Appellate Court of Illinois is

reported 123 Ill.App.3d 1038, 463 N.E.2d 918, 79 Ill.Dec. 364, (1984).

V

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on the 20th day of December, 1985. Timely Motion for Rehearing was filed, and was denied on the 4th day of February, 1986. This Court has jurisdiction under 28 USCA §1257 and of the Supreme Court Rules 17 and 21.

VI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

45 U.S.C. §153

> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including

> the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of facts and all supporting data bearing upon the disputes.

VII

STATEMENT OF FACTS

Petitioner Fred A. Koehler instituted this action against his employer, respondent Illinois Central Gulf Railroad Company, in the Twentieth Judicial Circuit Court of St. Clair County, State of Illinois. Petitioner alleged in his complaint that he had been retaliatory discharged from his employment for exercising his rights under the Federal Employer's Liability Act, or FELA, (45 U.S.C. Section 51 et seq.). The respondent moved to dismiss the suit,

arguing that resolution of petitioner's complaint for retaliatory discharge came within the exclusive jurisdiction of the National Railroad Adjustment Board pursuant to the Federal Railway Labor Act, 45 U.S.C. Sec. 151 et seq. (1982) (RLA). The trial court denied respondent's motion to dismiss but granted its motion to certify that question for interlocutory appeal pursuant to the Illinois Supreme Court rule 308(a). The following issue was submitted for review:

> "Whether a railroad employee covered under the provisions of the Railway Labor Act, 45 U.S.C. Section 151 et seq., may bring an action in state court against his employer for wrongful discharge without first exhausting his administrative remedies available under the Railway Labor Act."

Petitioner Fred A. Koehler was disqualified as a carman welder by the chief medical officer of the Illinois Central Gulf Railroad on December 12,

1979. As a member of the Brotherhood of Railway Carmen of America, their Helpers and Apprentices, Mr. Koehler was protected by a collective bargaining agreement governed by the Railway Labor Act, 45 U.S.C. Section 151 et seq. Both the collective bargaining agreement and the Railway Labor Act contain specific provisions for processing a grievance for alleged wrongful discharge; however, neither contain a remedy for retaliatory discharge.

On December 19, 1979, Mr. Koehler, through his union representative, processed a grievance under the collective bargaining agreement and the Railway Labor Act for his alleged wrongful discharge. In accordance with the procedures provided in the collective bargaining agreement and the Railway Labor Act, Mr. Koehler's grievance was denied on January 23, 1980.

On February 6, 1980, the general chairman of Mr. Koehler's union submitted a second-level grievance to respondent's manager of labor relations. This second-level grievance was denied in accordance with the applicable procedures on March 26, 1980.

On February 5, 1981, the president of Mr. Koehler's union submitted a grievance on behalf of Mr. Koehler to the National Railroad Adjustment Board under the terms and provisions of the labor agreement and the Railway Labor Act, 45 U.S.C. Section 151 et seq. Mr. Koehler had pursued to completion his administrative grievance.

The Appellate Court granted respondent's application for leave to appeal. In respondent's application for leave to appeal defendant presented the question of whether or not a railroad

employee was preempted under the RLA in filing a claim for retaliatory discharge in state court.

The Appellate Court reversed the Trial Court and entered judgment dismissing petitioner's complaint with prejudice. In so deciding, the court did not address either the issue certified or those briefed by the parties but relied instead on its decision in **Mouser v. Granite City Steel Division**, 121 Ill.App 3d 834, (1984). **Mouser** held that the tort of retaliatory discharge was not available to an employee covered by a collective bargaining agreement. Petitioner sought leave to appeal to the Supreme Court of Illinois. On leave to appeal, the Supreme court entered an order, under its supervisory authority, reversing the judgment of the appellate court and remanding the cause of the

circuit court to proceed in conformity of **Midgett v. Sackett-Chicago, Inc.** (1984), 105 Ill.2d 143. This order was predicated on the belief that the Supreme Court's recent decision in **Midgett** was dispositive. See 101 Ill.2d 566.

Respondent moved for reconsideration of supervisory order. In its memorandum supporting the motion, respondent argued that the RLA preempts any state court adjudication of employment based disputes between railroads and their employees, including an action for retaliatory discharge. Upon reconsideration, the Supreme Court entered the following order:

> "The motion for reconsideration of supervisory order entered in this cause on October 19, 1984, is allowed. Reconsideration of this case will be confined to the federal preemption issue and the collective bargaining agreement issue." (See Appendix)

The Supreme Court of Illinois affirmed the judgment of the Fifth District Appellate Court stating as follows:

> "A thorough reading of the RLA makes clear congress's intent that employment-based disputes between parties covered by the RLA are to be resolved exclusively pursuant to the Act. Under the RLA, state courts have no jurisdiction to hear and resolve disputes. 45 U.S.C. §153(i)(q) (1982). Because plaintiff's tort action for retaliatory discharge is, in essence, an employment-based dispute, we hold that it is preempted by the RLA." (See Appendix)

Petitioner filed a motion for rehearing and was denied on the 4th day of February, 1986.

We seek review of the Illinois Supreme Court's holding that petitioner's claim for retaliatory discharge is preempted under the Railway Labor Act.

VIII

REASONS FOR GRANTING THE WRIT

The decision of the Illinois Supreme Court in the instant cause is completely adverse to the existing line of cases controlling the federal law of preemption. There is no basis in law or logic for preemption of the state tort action of retaliatory discharge in favor of federal procedures concerning resolution of labor contract disputes.

The Illinois Supreme Court's decision in the instant case is not consistent with this court's decision in **Belknap v. Hale**, 462 U.S. 591, 103 S.Ct. 3172 (1983), and **Farmer v. Brotherhood of Carpenters, Local 25**, 430 U.S. 290, 97 S.Ct. 1056 (1977).

Federal law preemption is a complex and confused area of the law. It has been stated that:

> "Preemption is a matter of congressional intent, but the labor statutes provide little or no guidance as to what aspects of state law Congress intended to preempt. See **Belknap v. Hale**, 462 U.S. 591, 103 S.Ct. 3172 (1983).
>
> ***
>
> Essentially, in any preemption case the court must attempt to weigh the state's interests against those of federal labor policy. See **Garibaldi v. Lucky Food Stores, Inc.**, 726 F.2d 1367, 1372-73 (9th Cir. 1984)."

In **Belknap v. Hale**, this Court held that the National Labor Relation Act (NLRA), (219 U.S.C. 151 (1982), did not preempt a misrepresentation and breach of contract action brought against the employer in a state court by a strike breaker. This Court held that where the regulated conduct touched an interest so deeply rooted in local feeling and

responsibility, that, in the absence of compelling Congressional direction, it could not infer that Congress had deprived the states of the power to make a judicial determination. State courts do have jurisdiction over matters which are of traditional state concern.

This Court has set forth a test to determine whether an exception to the preemption rule is appropriate in a particular case. **Farmer v. Brotherhood of Carpenters, Local 25**, 430 U.S. 290, 97 S.Ct. 1056, (1977). First, the state's interest in regulating the conduct must be examined. Second, the potential for interference with the federal regulatory scheme must be determined. Third, the state's interest must be balanced against the potential for interference with the federal regulatory scheme. **Farmer**, 430 U.S. at

297-298, 97 S.Ct. at 1061-1062. In Farmer, plaintiff claimed that defendant union's actions in discriminating against him in referrals for employment constituted intentional infliction of emotional distress. The Court held that the claim was not preempted, even though the alleged tortious conduct could form the basis for an unfair labor practice charge.

This Court found the potential for interference with the federal regulatory scheme minimal since the state court action could be adjudicated without resolution of the merits of the underlying labor dispute and the labor proceeding would focus on whether the conduct was an unfair labor practice and not on whether the conduct was tortious.

The Farmer analysis was relied on in Garibaldi v. Lucky Food Stores, 726

F.2d 1367 (9th Cir. 1984). In that case the Ninth Circuit allowed an employee to bring suit in state court alleging that he was discharged for reporting to local health authorities that his employer had ordered him to deliver a load of spoiled milk. The court held that the state's interest in enforcing its local health regulations was strong, and that California could use private tort actions to enforce these regulations without interfering with federal labor policy. The court stated that:

> "It is clear that California's interest in providing cause of action for a violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship.
>
> ***
>
> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic

> relationship between the employer and employee. the remedy is in tort distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public--an interest which transcends the employment relationship (citation omitted)." 726 F.2d at 1374, 1375. (Emphasis in original)

In **Kelsay v. Motorola, Inc.**, 74 Ill.2d 72, 384 N.E.2d 353, 23 Ill.Dec. 559, (1978), the Illinois Supreme Court, in establishing the tort of wrongful discharge for filing of a workers' compensation claim, repeatedly highlighted the purpose of the Workers' Compensation Act, Ill.Rev.Stat. Ch. 48, 138.1 et. seq. (1983). The Court stated that the Workers' Compensation Act is a humane law of a remedial nature providing for efficient remedies for and protection of employees by providing them with prompt and equitable compensation for work related injuries. As such, the Act

promotes the general welfare of the state. The court stated that:

> "(T)he legislature enacted the workmen's compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act. We cannot ignore the fact that when faced with such a dilemma many employees, whose common law rights have been supplanted by the Act, would choose to retain their jobs, and thus, in effect, would be left without a remedy either common or statuatory." **Kelsay**, 384 N.E.2d at 357, 94 Ill.Dec. at 563.

The **Kelsay** decision holds that in recognizing a cause of action for wrongful discharge for the filing of a workers' compensation claim, the State of Illinois sought to ensure that employees will be provided with a remedy for work related injuries. The state interest is not in regulation of the employment

relationship. A claim grounded in state law for retaliatory discharge for this public policy reason furthers the state interest in protecting the general public, an interest which, as in **Garibaldi**, transcends the employment relationship. See **Garibaldi**, 726 F.2d at 1375.

The Illinois Supreme Court expanded the scope of tort liability for retaliatory discharge in **Midgett v. Sackett-Chicago, Inc.**, 105 Ill.2d 143, 473 N.E.2d 1280 (1984). In **Midgett**, the Court ruled that the employee may bring an action for retaliatory discharge in state court regardless of the existence of a collective bargaining agreement. The Court stated that to provide a complete remedy to a victim of a retaliatory discharge an employee must be permitted an action in tort,

independent of any remedy the employee may have under a collective bargaining agreement. See **Midgett**, 105 Ill.2d at 146.

It is apparent that Illinois has a strong public policy to insure the protection of employees from retaliatory discharge, and such interest outweighs any potential for interference with the federal regulatory scheme. Furthermore, the tort for retaliatory discharge as applied here confers state law rights on employees independent of any right established by a collective bargaining agreement.

In an action of retaliatory discharge, the only issues are why an employee was fired and whether that reason was in contravention of clearly mandated public policy. See Palmateer v. International Harvester Co., 85

Ill.2d 124, 421 N.E.2d 867, 52 Ill.Dec. 13 (1981). These determinations are squarely within the expertise of a state court of law. This being the case, not only is the railroad adjustment board without jurisdiction over non-contractual disputes, **Southern-Pacific Company v. Joint Counsel of Dining Car Employees**, 165 F.2d 26 (9th Circuit 1947), but also the board--which is neither a court nor a governmental body (**Dahlberg v. Pittsburg and L.E.R. Company**, 138 F.2d 121, (3rd Cir. 1943)--is not particularly qualified to identify the public policy of Illinois or usurp the fact finding function of a trial court.

In a very recent decision by the United States District Court for the Western Division of Missouri, **Raybourn v. Burlington Northern Railroad Co.**, 602 F.Supp. 395 (1985), the Court quickly

rejected defendant's suggestion that plaintiff's cause of action for false arrest and false imprisonment against the railroad were preempted, even though the alleged improper acts had taken place in the course of defendant's investi- gation of plaintiff with regard to an alleged drinking violation while at work. Plaintiff had been discharged as a result of the violation and had pursued his appeal rights under the contract. Defendant contended that those procedures were plaintiff's only remedy. The Court disagreed.

> "Simply because plaintiff may have arbitrable claim for wrongful discharge does not mean that plaintiff must pursue that remedy and some how seek relief in arbitration for the wrongs here alleged.
>
> There was no effort in enacting the Railroad Labor Act to comprehensively regulate the labor/management relations in that portion of the economy, or to divert from the courts every controversy between the employee

> and the railroad employer. The Court of Appeals for this circuit has rejected efforts to push all such controversies into the exclusive jurisdiction of the administrative bodies, particularly where the administrative remedies appear to be inadequate . . . (Citations omitted). . . . This is not a case where plaintiff is simply trying to relabel claims arising from a discharge as was attempted in **Magnuson v. Burlington Northern**, 576 F.2d 1367 9th Circuit. . . . Plaintiff claims to be the victim of a tort which is legally independent of any contractual claims or grievances that he may have or that may be arbitrable . . . .
>
> While the plaintiff's breach of contract claim may be factually related, it must be processed in another matter. It is sophistry to contend this typical tort claim is covered or precluded by the Railroad Labor Act . . . . 602 F.2d 385 at 387."

The **Raybourn** case is equally applicable here. Petitioner, Fred A. Koehler, is a victim of a tort, legally independent of any contractual claim or grievance. He claims that the respondent

took a course of action with the intent to harm him and to dissuade other similar employees from pursuing their rights under the FELA. He has not claimed any breach of contract, but rather a breach of a duty owed him by the respondent to refrain from intentionally causing him harm. Nothing in the union contract prevents the respondent from acting with the specific intent to cause harm to plaintiff in a retaliatory discharge for filing an FELA claim. Illinois law permits recovery for such tortious conduct and plaintiff should be entitled to pursue his civil remedy. **Midgett v. Sackett-Chicago, Inc.** 104 Ill.2d 143, 85 Ill.Dec. 475, 473 N.E.2d 1280 (1984).

Moreover, the decision of the Supreme Court of the State of Illinois in the instant case is not consistent with their holding in **Wheeler v.Catepillar Tractor Co.** 85 N.E.2d 372, 92 Ill.Dec. 561

(1985). In **Wheeler**, the Illinois Supreme Court held that Congress did not intend to preempt actions for the tort of retaliatory discharge by enacting the Energy Reorganization Act provision which permits employees to be reinstated in his employment and recover compensatory damages. (42 U.S.C. Sec. 5851 (1982).) The Court stated as follows:

> "Under the provisions of section 5851 an employee may be reinstated in his employment and recover compensatory damages, but no provision is made for punitive damages. In **Midgett v. Sackett-Chicago, Inc.** 105 Ill.2d 143 (1985), 85 Ill.Dec. 475, 473 N.E.2d 1280, it was held that a wrongfully discharged employee whose employment was covered by a collective-bargaining agreement providing for grievance procedures was not required to exhaust those procedures prior to bringing an action for the tort of retaliatory discharge. The court reasoned that such an employee had a cause of action in tort independent of any contract remedy which may have been based on the collective-bargaining agreement. Citing **Kelsay v. Motorola, Inc.** 74 Ill2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353

> (1978), the court held that he was not limited to the remedies provided in the collective-bargaining agreement and could seek to recover punitive damages. We find the situation here analogous to **Silkwood** and conclude that it was not the congressional intent to preempt the field." 485 N.E.2d at 376, 92 Ill.Dec. at 565.

Analogous to the Energy Reorganization Act, no provisions of the Railway Labor Act protect employees under collective bargaining agreements governed by the Railway Labor Act against retaliatory discharge.

Throughout this cause, respondent's reliance on **Andrews v. Louisville Nashville Railroad Company**, 406 U.S. 320, 92 S.Ct. 1562, (1972), 32 L.Ed.2d 195 (1956) and **Jackson v. Consolidated Rail Corp.**, 717 F.2d 1045, (7th Cir. 1983), has been misplaced and these cases are not applicable precedent. These cases hold only that contractual disputes

must proceed through the RLA's administrative procedure even if the parties have agreed otherwise.

There is no basis for asserting that Andrews or Jackson extends the preemptive effect of the RLA beyond contractual disputes. The Andrews case dealt only with employees claiming wrongful discharge arising out of the interpretation of the collective bargaining agreement. The Court in Andrews stated:

> "Thus, petitioner's claim, and respondent's disallowance of it, stem from different interpretation of the collective bargaining agreements . . . . and disclaimant is therefore subject to the acts requirement that it be submitted to the board for adjustment." 406 U.S. at 325, 92 S.Ct. at 1565.

In the present case it has not been suggested or pled that respondent breached any provision of the contract,

thereby giving the petitioner a remedy under the contract, nor has petitioner pled or relied on any particular provision of the contract as specifically authorizing his actions toward the respondent. Petitioner has contended throughout this cause that defendant has intentionally taken action to punish him and to deter others from the exercise of his and their federally protected rights, conferred by the FELA.

Jackson is also distinguishable for a reason set forth in Justice Simon's dissent on the Court's denial of the petition of plaintiff's petition for rehearing. Justice Simon of the Illinois Supreme Court stated as follows:

> "Retaliatory discharge is a tort arising from state law, while wrongful discharge is an epithet denoting a discharge made in breach of a labor agreement. Retaliatory discharge is not the equivalent of wrongful discharge since the former is not an action premised on the employer's breach of contract. Kelsay v.

> **Motorola, Inc.**, 1978, 74 Ill.2d 172, 167. Regardless of terms contained in a collective bargaining agreement, the elements of retaliatory discharge remain the same. Even if the collective bargaining agreement in this case were written most favorably for an employer, it could at most grant the employer the right to charge the plaintiff at will, in an action for retaliatory discharge would still be well founded.
>
> For this reason, **Jackson v. Consolidated Rail Corp.**, (7th Circuit 1983) 717 F.2d 1045, is not applicable precedent. That Court equated retaliatory discharge with wrongful discharge in violation of a labor agreement, but the two terms are not synonymous. Judge Posner noted in his separate opinion, "Retaliatory discharge is not a grievance within the board's exclusive jurisdiction. Because it would exist even if there were no collective bargaining agreement . . ." 717 F.2d 1045, 1059. (Posners, J., dissent in part). (See Appendix)

To allow a cause of action for retaliatory discharge to other union employees while denying it to a railroad employee governed by the RLA would lead

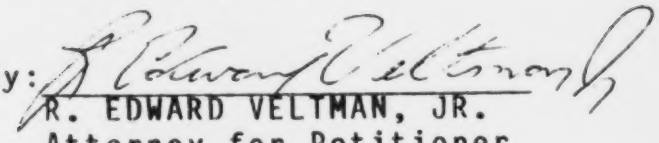
to an absurd result in that punitive damages would be available to other union employees but not to a union employee under a collective bargaining agreement pursuant to the RLA.

The state cause of action for retaliatory discharge is not protected under the RLA. State jurisdiction over the claim will not interfere with the federal contractual scheme. The tort of retaliatory discharge touches on interests so deeply rooted in local feeling and responsibility that it cannot be inferred that federal law will preempt and intend to deprive the state of the right and power to act.

It is therefore respectively requested that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

CRAIN, COOKSEY, VELTMAN &
PURSELL, LTD.

By: 

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1985 TERM

NO. _____

FRED A. KOEHLER

Petitioner

vs.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,

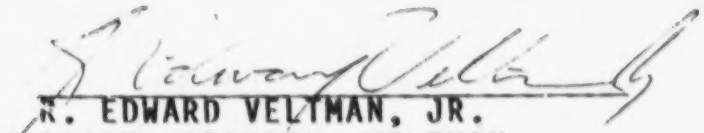
Respondent.

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed to the persons listed below a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI**, in compliance with 28 U.S.C.A. Rule 28(5)(b), by placing said copy in an envelope, legibly addressed, securely

sealed and sufficiently stamped and depositing same in the United States Mail at Centralia, Illinois at 5 o'clock P.M., all in compliance with said Rule on this date.

DATED this 3rd day of May, 1986.



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Hon. Alexander L. Stevas, Clerk
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Boyle & Roessler
5000 West Main Street
Box 692
Belleville, Illinois 62222

NO. ___ ___ ___

IN THE SUPREME COURT

OF THE UNITED STATES

October, 1985 Term

FRED A. KOEHLER,	)	
	)	
Petitioner,	)	
	)	On Writ of
vs.	)	Certiorari to the
	)	Supreme Court of
ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,	)	Illinois
	)	
Respondent.	)	

ENTRY OF APPEARANCE

Now comes R. Edward Veltman, Jr. of the firm of Crain, Cooksey, Veltman & Pursell, Ltd. and hereby enters his appearance as counsel of record for the petitioner, Fred A. Koehler in the above-entitled cause.

CRAIN, COOKSEY, VELTMAN &
PURSELL, LTD.

By: _____
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85-1848

NO. _____

Supreme Court, U.S.
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OF THE UNITED STATES

October, 1985 Term

FRED A. KOEHLER, Petitioner, vs. ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation, Respondent.	)	On Writ of Certiorari to the Supreme Court of Illinois

APPENDIX

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EDITOR'S NOTE

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TABLE OF CONTENTS

1. Supreme Court of the State of Illinois, Order Staying Mandate.....Page 1

2. Supreme Court of the State of Illinois, Dissenting Opinion of Mr. Justice Simon on Petition for Rehearing.....Page 3

3. Supreme Court of the State of Illinois, Opinion delivered upon the rendering of judgment.....Page 7

4. Supreme Court of the State of Illinois, Order allowing Respondent's Motion for Reconsideration.....Page 14

5. Supreme Court of the State of Illinois, Order Remanding the Cause to the Circuit Court of St. Clair County, Illinois for further proceedings.....Page 15

6. Appellate Court of Illinois, Fifth District, Opinion reversing the Circuit Court of St. Clair County, Illinois.....Page 17

7. Appellate Court of Illinois, Fifth District, Dissenting Opinion filed by Mr. Justice Harrison.....Page 24

8. Appellate Court of Illinois, Fifth District, Order granting application for leave to appeal.....Page 31

9. Twentieth Judicial Circuit, St. Clair County, Illinois, Order granting defendant's Motion to Certify Question for Interlocutory Appeal.....Page 32

10. Twentieth Judicial Circuit, St. Clair County, Illinois, Order denying Motion to Reconsider.....Page 35

11. Twentieth Judicial Circuit, St. Clair County, Illinois, Order denying defendant's Motion to Dismiss.....Page 36

12. Supreme Court of the State of Illinois, Judgment sought to be reviewed.....Page 37

13. Supreme Court of the State of Illinois, Order denying Petition for Rehearing.....Page 45

NO. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Appellant,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD CO.	)
	)
Appellee.	)

(Date Entered: February 19, 1986)

ORDER

This matter has come for consideration upon the motion of appellant to stay the mandate of this Court pending appeal or application for certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for certiorari or the expiration of the period within which

said application or notice may be filed. If certiorari is applied for or notice of appeal is filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or certiorari may be sought.

/s/ Joseph H. Goldenhersh
Justice, Supreme Court of
Illinois

NO. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Appellant,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)
	)
Appellee.	)

(Date Entered: February 4, 1986)

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Goldenhersh, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 14, 1986.

Enclosed is a copy of Justice Simon's dissent.

JUSTICE SIMON, dissenting:

Because the plaintiff's claim in this case is wholly independent of rights and obligations embodied in the defendant's collective-bargaining agreement, I cannot agree with the majority's conclusion that the Railway Labor Act (45 U.S.C. sec. 151 *et seq.* (1982)) (RLA) preempts this action. Retaliatory discharge is a tort arising from State law, while the "wrongful" in wrongful discharge is an epithet denoting a discharge made in breach of a labor agreement. Retaliatory discharge is not the equivalent of wrongful discharge since the former is not an action premised on the employer's breach of contract. (See *Kelsay v. Motorola, Inc.* (1978), 74 Ill. 2d 172, 187.) Regardless of terms contained in the collective-bargaining agreement, the elements of retaliatory discharge remain the same. Even if the collective-bargaining agreement in this case were written most favorably for the employer, it could at most grant the employer the right to discharge the plaintiff at will, and an action for retaliatory discharge would still be well founded.

For this reason, *Jackson v. Consolidated Rail Corp.* (7th Cir. 1983), 717 F.2d 1045, is not an applicable precedent. That court equated retaliatory discharge with wrongful discharge in violation of a labor agreement, but the two terms are not synonymous. As Judge Posner noted in his separate opinion, retaliatory discharge is not a grievance within the Board's exclusive jurisdiction "because it would exist even if there were no collective bargaining agreement ***." 717 F.2d 1045, 1059 (Posner, J., dissenting in part).

The rationale for preemption in cases of wrongful discharge is that an allegedly wrongful discharge requires construction of the labor contract, and it is therefore a "minor dispute" within the exclusive jurisdiction of the National Railroad Adjustment Board. (45 U.S.C. sec. 153 First (i) (1982); *Carbone v. Meserve* (1st Cir. 1981), 645 F.2d 96, 98 ("minor dispute" refers to disputes over the meaning of contractual terms).) Exclusive jurisdiction over minor disputes is vested with the Board because it has administrative expertise in "the interpretation of collective bargaining agreements," and because "uniform administrative interpretation

[of those agreements] is of great importance." (*Pennsylvania R.R. Co. v. Day* (1959), 360 U.S. 548, 551-52, 3 L. Ed. 2d 1422, 1426, 79 S. Ct. 1322, 1324.) It is apparent from the development of retaliatory discharge as a tort in this State that provisions of an employment contract are superfluous to a determination of whether a tortious discharge occurred. (See *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill. 2d 143, 149 ("to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective-bargaining agreement").) In fact, this court recently held that an action for retaliatory discharge does not lie where the plaintiff alleges that he was discharged in retaliation for pursuing private rights conferred by his contract of employment (*Price v. Carmack Datsun, Inc.* (1985), 109 Ill. 2d 65), so it cannot be said that the distribution of private rights in the defendant's collective-bargaining agreement is relevant to the outcome of this case.

In an action for retaliatory discharge, the only issues are why an employee was fired and whether that reason was in contravention of clearly mandated public policy (*Palmateer v. International Harvester Co.* (1981), 85 Ill. 2d 124, 133-34). These determinations are squarely within the expertise of a court of law. Not only is the Adjustment Board without jurisdiction over noncontractual disputes (*Southern Pac. Co. v. Joint Council of Dining Car Employees* (9th Cir. 1947), 165 F.2d 26), but also the Board—which is neither a court nor a governmental body (*Dahlberg v. Pittsburgh & L.E.R. Co.* (3d Cir. 1943), 138 F.2d 121)—is not particularly qualified to identify the public policy of this State or usurp the fact-finding function of a trial court.

The majority's reliance on *Andrews v. Louisville & Nashville R.R. Co.* (1972), 406 U.S. 320, 32 L. Ed. 2d 95, 92 S. Ct. 1562, is misplaced. *Andrews* holds only that *contractual* disputes must proceed through the RLA's administrative procedure even if the parties have agreed otherwise. There is no basis for the contention in the majority opinion that Andrews extends the preemptive effect of the RLA beyond contractual disputes. In fact, *Andrews* held the action in that case to be preempted because it was a contractual

dispute. (406 U.S. 320, 324, 32 L. Ed. 2d 95, 99, 92 S. Ct. 1562, 1564 ("petitioner's claim, and respondent's disallowance of it, *stem from differing interpretations of the collective-bargaining agreement.* *** [and h]is claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment").) Retaliatory discharge is a law of State rights and obligations existing "independently of private agreements"; since it cannot be "waived or altered by agreement," it is error to preempt State jurisdiction and defer to an administrative agency whose sole function is the interpretation of negotiated agreements. *Allis Chalmers v. Lueck* (1985), 471 U.S. ___, ___, 85 L. Ed. 2d 206, 216, 105 S. Ct. 1904, 1912.

This action does not implicate contractual rights or Federal labor policy. I cannot, therefore, see any basis in law or logic for preemption of an uncontrived tort action in favor of Federal procedures for the resolution of labor contract disputes, and I dissent.

NO. 60233

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

FRED A. KOEHLER,

Appellant,

vs.

ILLINOIS CENTRAL GULF RAILROAD CO.,

Appellee.

(Date Entered: December 20, 1985)

JUSTICE MORAN delivered the opinion of the court:

Plaintiff, Fred A. Koehler, filed suit in the circuit court of St. Clair County against defendant, the Illinois Central Gulf Railroad Company, his employer, alleging retaliatory discharge. Defendant moved to dismiss the suit, arguing that resolution of plaintiff's complaint for retaliatory discharge came within the exclusive jurisdiction of the National Railroad Adjustment Board pursuant to the Federal Railway Labor Act (45 U.S.C. secs. 151 through 164 (1982)) (RLA). The trial court denied defendant's motion but granted its motion to certify the question for interlocutory appeal pursuant to our Rule 308(a) (87 Ill. 2d R. 308(a)). The following issue was submitted for review:

> "Whether a railroad employee covered under the provisions of the Railroad [*sic*] Labor Act, 45 U.S.C. section 151 *et seq.* may bring an action in state court against his employer for wrongful discharge without first exhausting his administrative remedies available under the Railroad [*sic*] Labor Act."

A majority of the appellate court reversed the trial court and entered judgment dismissing plaintiff's complaint with prejudice. (123 Ill. App. 3d 1038.) In so deciding, the court did not address either the issue certified or

those briefed by the parties but relied instead on its decision in *Mouser v. Granite City Steel Division* (1984), 121 Ill. App. 3d 834, which held that the tort of retaliatory discharge was not available to an employee covered by a collective-bargaining agreement.

Plaintiff sought leave to appeal to this court. On leave to appeal, this court entered an order, under its supervisory authority, reversing the judgment of the appellate court and remanding the cause to the circuit court to proceed in conformity with *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill. 2d 143. This order was predicated on the belief that our recent decision in *Midgett* was dispositive. See 101 Ill. 2d 566.

Defendant moved for reconsideration of the supervisory order. In its memorandum supporting the motion, defendant argued that the RLA preempts any State court adjudication of employment-based disputes between railroads and their employees, including an action for retaliatory discharge. Upon reconsideration, the following order was entered: "[T]he motion for reconsideration of the supervisory order entered in this cause on October 19, 1984, is allowed. Reconsideration of this case will be confined to the Federal preemption issue [and the collective-bargaining-agreement issue]."

The factual basis of plaintiff's claim began with an injury to his right knee sustained in January 1972. Plaintiff recovered and was certified as fit to return to work with defendant by his physician and defendant's physicians. In June 1972, plaintiff filed suit to recover damages for the knee injury pursuant to the Federal Employers' Liability Act (45 U.S.C. secs. 51 through 60 (1970)) (FELA), a Federal statute applicable to interstate railroads in their capacity as employers. FELA imposes liability on railroad employers for injuries to employees caused by an employer's negligence. (45 U.S.C. sec. 51 (1970).) This suit was tried to a verdict, but the record does not indicate which party prevailed on the verdict.

Plaintiff sustained a second work-related injury in December 1978. The injury was to his back. In the course of various medical examinations conducted by defendant's

physicians occasioned by this second injury, interest in plaintiff's earlier knee injury was revived.

A physician for defendant reported that he was more concerned about plaintiff's prior knee injury than he was about the recent back injury. In a report to defendant in April 1979, the physician noted that the knee had undergone "degenerative change." Thereafter, in December 1979, the chief medical officer for defendant permanently disqualified plaintiff from his position as a carman welder because of "degenerative changes in the right knee." Plaintiff was permanently disqualified even though his physician had reported that plaintiff had no disability from either the knee or back injuries which would restrict him in the performance of his duties.

One week after his permanent disqualification plaintiff filed a grievance pursuant to the terms of the collective-bargaining agreement in effect between his union and defendant. One month later, in January 1980, plaintiff filed a second suit under FELA in State court seeking recovery for his back injury. The record does not disclose the result of this second FELA action. Six months later, in July 1980, plaintiff filed the instant action.

In his complaint, plaintiff alleged that his permanent disqualification as a carman welder was in retaliation for having sued defendant under FELA. At the time plaintiff filed his action for retaliatory discharge the second suit under FELA and his grievance were pending. Plaintiff's grievance has since been resolved. The grievance was referred to the National Railroad Adjustment Board in February 1981 as provided by the RLA. Resolution was reached in July 1983 when plaintiff was ordered reinstated with retroactive seniority upon securing a favorable medical report from a jointly selected panel of three physicians. Plaintiff was reinstated with full seniority pursuant to this order in September 1983.

This record reveals that, within seven months of his permanent disqualification as a carman welder, plaintiff had initiated actions in three separate forums. Our present concern is with the last action taken, the suit for

retaliatory discharge. We address the limited issue presented: Does the RLA preempt an action for retaliatory discharge brought by an employee covered by the Act?

The leading case on the preemptive effect of the RLA is *Andrews v. Louisville & Nashville R.R. Co.* (1972), 406 U.S. 320, 32 L. Ed. 2d 95, 92 S. Ct. 1562. There the Supreme Court held that an employee who was not permitted to return to work by his employer after recovering from injuries sustained in an automobile accident could not maintain a suit in State court on a State-law contract claim for wrongful discharge. The court found that the RLA governed the dispute. The court also held that the RLA preempted State actions based on wrongful discharge and that the National Railroad Adjustment Board has exclusive jurisdiction to adjudicate all claims arising under the RLA.

Plaintiff attempts to distinguish his case from *Andrews* by pointing out that *Andrews* addressed *wrongful* rather than *retaliatory* discharge. He concedes that wrongful discharge is a claim grounded in the contract of employment, thereby falling within the exclusive jurisdiction of the RLA. However, plaintiff contends that his claim of retaliatory discharge is not a contractual action but, rather, a tort action. Because his action is in tort, plaintiff argues that *Andrews* is inapposite. We disagree. The court in *Andrews* made it clear that the preemptive effect of the RLA was not limited to contractual disputes. The court explained that "the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent *stems not from any contractual undertaking between the parties but from the Act itself.*" (Emphasis added.) 406 U.S. 320, 323, 32 L. Ed. 2d 95, 99, 92 S. Ct. 1562, 1565.

Moreover plaintiff's contention was recently rejected by the United States Court of Appeals for the Seventh Circuit, in *Jackson v. Consolidation Rail Corp.* (7th Cir. 1983), 717 F.2d 1045, 1049. There, as in the instant case, a railroad employee sought recovery on a State-law tort claim for retaliatory discharge, alleging that he was terminated for filing an action under the FELA. The plaintiff in

Jackson argued that *Andrews* was not controlling because *Andrews* applied to "wrongful" rather to "retaliatory" discharge. The court did not find this distinction persuasive, characterizing retaliatory discharge as merely one type of wrongful discharge. (717 F.2d 1045, 1049.) The court went on to note that the State-law claim was "identical to the claim he would have made, had he pursued the grievance through administrative channels." (717 F.2d 1045, 1054.) Because the State-law tort claim and any claim brought under the RLA would be the same claims, the court found *Andrews* controlling and expressly held that the RLA preempts a State-law tort action for retaliatory discharge premised on termination for having filed suit under the FELA. 717 F.2d 1045, 1051, 1056.

We agree with the Seventh Circuit's analysis and application of *Andrews*. We therefore hold that the RLA preempts our State-law tort action alleging retaliatory discharge for having filed suit under the FELA where, as here, it is brought by an employee covered by the RLA.

Plaintiff seeks to avoid the preemptive effect of the RLA by arguing that his case falls within the ambit of certain recognized exceptions to preemption. Specifically, he argues that preemption does not apply "where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters & Joiners of America* (1977), 430 U.S. 290, 302, 51 L. Ed. 2d 338, 351, 97 S. Ct. 1056, 1064.

Plaintiff's reliance on *Farmer* is misplaced. First, the *Farmer* exception to preemption, by its terms, applies to the preemptive effect of the National Labor Relations Act (430 U.S. 290, 292, 51 L. Ed. 2d 338, 345, 97 S. Ct. 1056, 1059), not to the RLA. Second, assuming the applicability of *Farmer* to the instant case, our reading of the RLA indicates that a State-law action for retaliatory discharge would "threaten undue interference with the federal regulatory scheme." The RLA is an elaborate and extensive administrative scheme. (45 U.S.C. secs. 151 through 164 (1982).) Under this scheme "disputes *** growing out of

grievances" are to be resolved in the first instance by the parties. If the parties are unsuccessful, the RLA provides that the dispute be referred to the National Railroad Adjustment Board for resolution. (45 U.S.C. sec. 153 First (i) (1982).) Decisions of the Adjustment Board are final and binding. (45 U.S.C. sec. 153 First (m) (1982).) Under the RLA, a party dissatisfied with a decision of the Adjustment Board may obtain limited review in Federal district court with appeal to the court of appeals. (45 U.S.C. sec. 153 First (q) (1982).) The RLA does not accord original jurisdiction over employment-related disputes to either Federal or State courts. Original, exclusive jurisdiction is given to the Adjustment Board. (45 U.S.C. sec. 153 First (i) (1982).) As noted above, jurisdiction over appeals from decisions of the Adjustment Board is given the Federal courts. 45 U.S.C. sec. 153 First (q) (1982).

Our review of the RLA indicates that plaintiff's suit for retaliatory discharge is precluded as an "undue interference" with the dispute-resolution scheme of the RLA. Stripped to its essentials, plaintiff's suit is a reformulation in tort of his grievance which, as the record shows, fell within the purview of the RLA. Allowing plaintiff's suit to proceed would allow a State court, applying State law, to resolve "disputes *** growing out of grievances." (45 U.S.C. sec. 153 First (i) (1982).) Certainly, this result would unduly interfere with the operation of the dispute-resolution machinery of the RLA. Therefore, even if *Farmer* applies to cases arising under the RLA, it is of no assistance to plaintiff.

A thorough reading of the RLA makes clear Congress' intent that employment-based disputes between parties covered by the RLA are to be resolved exclusively pursuant to the Act. Under the RLA, State courts have no jurisdiction to hear and resolve such disputes. (45 U.S.C. secs. 153 First (i), (q) (1982).) Because plaintiff's tort action for retaliatory discharge is, in essence, an employment-based dispute, we hold that it is preempted by the RLA.

For the reasons here stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.

No. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Petitioner,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)
	)
Respondent.	)

(Filed March 27, 1985)

The motion by respondent for reconsideration of the order entered October 19, 1984 is allowed. The supervisory order is vacated, and the petition for leave to appeal is allowed. Notices of election shall be filed pursuant to Supreme Court Fule 315(g).

Golderhersh, J., took no part.

No. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,)
)
Petitioner,)
)
vs.)
)
ILLINOIS CENTRAL GULF)
RAILROAD COMPANY,)
)
Respondent.)

(Date Entered: October 19, 1984)

Leave to Appeal, Appellate Court, Fifth District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause and entered the following supervisory order:

> Although this appeal involves a claim that the plaintiff was wrongfully discharged for exercising rights under the Federal Employer's Liability Act (45 U.S.C. sec. 51 et seq.) rather than the Workers' Compensation Act, (Ill.Rev.Stat. 1983, ch.48, par. 138.1 et seq.), we consider the question to be comparable to that decided in Midgett v. Sackett-Chicago, Inc. (Oct.19, 1984), Nos. 59341, 59350 cons.

Accordingly, in the exercise of this court's supervisory jurisdiction, the judgment of the Appellate Court, Fifth District (123 Ill.App.3d 1038), is reversed, and the cause is remanded to the circuit court of St. Clair County for further proceedings consistent with the decision in **Midgett**.

Goldenhersh J., took no part.

No. 5-83-0401

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FRED A. KOEHLER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County
	)	
vs.	)	
	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,	)	
	)	
Defendant-Appellant.	)	

(Filed May 3, 1984)

PRESIDING JUSTICE WELCH delivered the opinion of the court:

Plaintiff Fred A. Koehler instituted this action against his employer, defendant Illinois Central Gulf Railroad Company, in the circuit court of St. Clair County. He alleged in his complaint that he had been wrongfully discharged from his employment for exercising his rights under the Federal Employers' Liability Act or FELA (45

U.S.C. §51 et seq.). The defendant moved to dismiss the complaint, but the trial court denied that motion. At the defendant's request, the court certified a question for interlocutory appeal, and we granted defendant's application for leave to appeal. (87 Ill.2d R. 308.) We must reverse the decision of the trial court because an employee who is covered by a collective bargaining agreement prohibiting termination without just cause may not maintain a tort action against his employer for retaliatory discharge.

The plaintiff's employment with the defendant was terminated in 1979. At that time, an action brought by the plaintiff against the defendant under the FELA was pending in the circuit court of St. Clair County, and, in 1974, the plaintiff obtained a verdict in his favor

against the defendant in a suit brought under the same enactment. As a member of the Brotherhood of Railway Carmen of America, their Helpers and Apprentices, the plaintiff was protected by a collective bargaining agreement between the defendant and the System Federation No. 99, Railway Employees' Department, AFL-CIO. That agreement prohibited the unjust termination of employment and provided for a grievance procedure in the case of violation of the agreement.

In December, 1979, the plaintiff's local union submitted a grievance on his behalf to the defendant. It was denied. Pursuant to the collective bargaining agreement, an appeal from this denial was taken within the defendant. The grievance was again denied. In February, 1981, the Brotherhood of Railway Carmen submitted the plaintiff's claim to the

National Railroad Adjustment Board. That claim was still pending when the notice of appeal was filed in the present case. In 1983, a hearing was held on the plaintiff's claim, the Board rendered its decision, and the plaintiff was reinstated as an employee of the defendant, with full seniority, but without retroactive pay or benefits.

The question certified by the trial court was whether an employee whose employment is covered by the Railway Labor Act (45 U.S.C. §151 et seq.), portions of which are incorporated by reference into the grievance procedures in the collective bargaining agreement at bar, may bring a wrongful discharge action in State court without exhausting the remedies provided by that act. Of course, the plaintiff has now exhausted those remedies by pursuing his claim to a

successful conclusion. The focus of the briefs in this court is instead upon whether the remedies established by the act pre-empt any State tort action for wrongful discharge.

Subsequent to oral argument in this case, we filed an opinion in **Mouser v. Granite City Steel Division** (1984), 121 Ill.App.3d 834, 460 N.E.2d 115. In **Mouser**, we examined conflicting decisions in the appellate court and the Illinois Federal courts on the issue of whether an employee covered by a collective bargaining agreement preventing discharge without just cause could bring an action for wrongful discharge against his employer. We observed that the policies behind that judicially-created tort were not present in the case of an employee covered by such an agreement. Along with the

majority of districts in this court, and the Federal courts in this State, we concluded that the tort of wrongful or retaliatory discharge was not available to an employee whose employment was governed by a collective bargaining agreement proscribing termination of employment without just cause.

There is no question that the plaintiff here is covered by such an agreement. Under Mouser, then, he may not maintain an action in tort for wrongful discharge under Illinois law. Having decided that no Illinois tort remedy supports the plaintiff's complaint, we need not decide whether such a remedy would be pre-empted by Federal law if it existed. Accordingly, the decision of the circuit court of St. Clair County is reversed and the

plaintiff's complaint is dismissed with prejudice.

ORDER REVERSED; COMPLAINT DISMISSED WITH PREJUDICE.

JONES, J., concurring.

NO. 5-83-0401

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FRED A. KOEHLER,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of St. Clair
	)	County
vs.	)	
	)	
ILLINOIS CENTRAL GULF RAILROAD CO., a corporation,	)	
	)	
Defendant-Appellant.	)	

(Filed May 3, 1984)

Mr. JUSTICE HARRISON, dissenting:

I respectfully dissent, for I believe that the result reached in this case operates to undermine the public policy considerations inherent in our supreme court's recognition of a cause of action for retaliatory discharge. In Kelsay v. Motorola, Inc. (1978) 74 Ill.2d 172, 384 N.E.2d 353, wherein such cause of action was recognized, the court also held that punitive damages may be awarded to the

discharged employee under appropriate circumstances. The court noted that, in the absence of the deterrent effect of punitive damages, there would be little to dissuade an employer from wrongfully discharging an employee. (74 Ill.2d 172, 186.) In so holding, the court joined those courts which have recognized that the situation of the employee and employer in today's society is hardly equivalent, and that the "mutuality of obligations" rule permitting discharge of the employee at will for any or no cause is unduly harsh in the modern world. (See Smith v. Atlas Off-Shore Boat Service, Inc., (5th Cir. 1981), 653 F.2d 1057, 1060-1063, and authorities cited therein.) In my view, the holdings in the instant case and the cases relied on in support of today's result operate to take away a significant part of what our

supreme court in Kelsay expressly gave, without restriction, to the employee discharged for exercising the rights expressly given him by legislative enactment. Nothing in Kelsay even remotely indicates that its protections are not to extend to employees covered by a collective bargaining agreement, and today's decision has the irrational effect of immunizing from punitive damages the employer who fires a union member, while providing no such protection to the employer who fires a non-union employee. Wyatt v. Jewel Companies, Inc. (1982), 108 Ill.App.3d 840, 841-42, 439 N.E.2d 1053.

Moreover, in addition to these general policy considerations, specific analysis of the differing functions of a collective bargaining agreement and the tort remedy for retaliatory discharge

underscores the erroneousness of the result reached by the majority herein. The issue before this court does not involve interpretation of a collective bargaining agreement, an appropriate matter for arbitration (Hendley v. Central of Georgia R.R. Co. (5th Cir.1980), 609 F.2d 1146,1151); rather, the question here is whether the terms of the agreement can preclude the pursuit of a wholly independent and judicially created remedy for retaliatory discharge. As observed by Justice Barry in his well-reasoned dissent in Cook v. Caterpillar Tractor Co. (1980), 85 Ill.App.3d 402, 407 N.E.2d 95, "in his complaint the plaintiff is not alleging that the discharge was wrongful in the sense that the terms of the collective bargaining agreement were violated. (citations) Rather, the plaintiff is

seeking damages for his retaliatory discharge based upon his pursuing a workmen's compensation claim. The plaintiff's cause of action sounds not in contract, but in tort. It is based not upon violation of the terms of the collective bargaining agreement, but upon a violation of the public policy of the State of Illinois to compensate employees for work-related injury." (85 IllApp.3d 402,407 (emphases in original).) Here, plaintiff's action is based upon an express public policy seeking to deter retaliatory discharge, and not upon anything granted to the employee under the terms of the collective bargaining agreement.

Finally, we should not ignore the reality that many collective bargaining agreements simply do not provide the discharged employee with protection

comparable to that afforded by Kelsay. As one law review article dealing with Kelsay has noted, reliance on collective bargaining agreements alone under the circumstances presented here may deprive the employee of any recovery in some cases, as when a union is reluctant to arbitrate, or may severely limit the employee's recovery. (Note, Kelsay v. Motorola, Inc.-Illinois Courts Welcome Retaliatory Discharge Suits Under the Workmen's Compensation Act, 1980 U.Ill.L.F.839, 852 & n.80, 853 & n.81.) Indeed, the potential for unfair diminution of the employee's recovery is graphically illustrated by this case, where plaintiff's full pursuit of his rights under the collective bargaining agreement yielded nothing better than reinstatement without retroactive pay or benefits. Such a

result does nothing to provide the disincentive for retaliatory discharge inherent in Kelsay. Today's decision, which eviscerates both the rights conferred on employees by Kelsay and the ability of the courts to give full force to legislative schemes designed for the protection of employees, is simply out of touch with the slow but steady evolution of the rights of employees in the latter half of this century.

No. 5-83-0401

IN THE APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FRED A. KOEHLER, Plaintiff-Appellee, vs. ILLINOIS CENTRAL GULF RAILROAD COMPANY, Defendant-Appellant.	)	Appeal from the Circuit Court of St. Clair County
	)	No. 80-L-649

(Filed July 12, 1983)

ORDER

This cause considered on defendant-appellant's application for leave to appeal, and the Court being advised in the premises;

IT IS THEREFORE ORDERED that the application for leave to appeal is hereby GRANTED.

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

FRED A. KOEHLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 80-L-649
	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,	)	
	)	
Defendant.	)	

(Filed June 1, 1983)

ORDER GRANTING DEFENDANT'S MOTION TO CERTIFY QUESTION FOR INTERLOCUTORY APPEAL

The court having heard argument of counsel and being fully advised in the premises makes the following order:

1. Defendant's motion pursuant to the provisions of Ill.Rev.Stat., Ch.110A, §308 to certify a question for interlocutory appeal is allowed.

2. Plaintiff's complaint states a cause of action that he was wrongfully

discharged by the defendant railroad company for having filed and prosecuted lawsuits for personal injuries pursuant to the provisions of 45 U.S.C. §51-60, commonly known as the Federal Employers Liability Act.

3. The defendant corporation moved to dismiss plaintiff's complaint for wrongful discharge for the reason that plaintiff has not exhausted his exclusive administrative remedies under the provisions of the National Railway Labor Act, 45 U.S.C.A., §151 et seq.

4. This court denied the defendant corporation's motion to dismiss.

5. The court finds that there are substantial grounds for difference of opinion concerning this ruling and that an immediate appeal from its order may materially advance the ultimate determination of the litigation.

6. The court hereby certifies the following question for interlocutory appeal pursuant to the provisions of Ill. Rev.Stat. Ch. 110A, §308:

> "Whether a railroad employee covered under the provisions of the Railroad Labor Act, 45 U.S.C. §151 et seq. may bring an action in state court against his employer for wrongful discharge without first exhausting his administrative remedies available under the Railroad Labor Act."

7. The court further finds that there is no cause for delaying the proceedings in the Circuit Court and specifically denies defendant's motion for a stay of further proceedings pending any appeal.

Dated this 27 day of May, 1983.

/s/Judge Richard Goldenhersh

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

FRED A. KOEHLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 80-L-649
	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)	
	)	
Defendant.	)	

(Filed March 29, 1983)

ORDER

This cause coming before the Court; the Court being fully advised in the premises and having jurisdiction of the subject matter;

The Court finds:.....

IT IS THEREFORE ORDERED:

Motion to Reconsider is denied.

Enter:

/s/Richard P. Goldenhersh, Judge

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

FRED A. KOEHLER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 80-L-649
	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)	
	)	
Defendant.	)	

(Filed November 4, 1982)

This cause coming before the Court; the Court being fully advised in the premises and having jurisdiction of the subject matter;

The Court finds.....

IT IS THEREFORE ORDERED:

Defendant's Motion to Dismiss denied. Defendant granted 28 days to answer.

Enter:

/s/Richard Goldenhersh, Judge

NO. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Appellant,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD CO.	)
	)
Appellee.	)

(Date Entered: December 20, 1985)

The mandate(s) of this Court will issue to the Appellate Court, Circuit Court or other Agency on January 17, 1986, unless a petition for rehearing (due January 10, 1986) or motion to stay the mandate is timely filed. Supreme Court Rule 368.

NO. 60233

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

FRED A. KOEHLER,

Appellant,

vs.

ILLINOIS CENTRAL GULF RAILROAD CO.

Appellee.

(Date Entered: December 20, 1985)

JUSTICE MORAN delivered the opinion of the court:

Plaintiff, Fred A. Koehler, filed suit in the circuit court of St. Clair County against defendant, the Illinois Central Gulf Railroad Company, his employer, alleging retaliatory discharge. Defendant moved to dismiss the suit, arguing that resolution of plaintiff's complaint for retaliatory discharge came within the exclusive jurisdiction of the National Railroad Adjustment Board pursuant to the Federal Railway Labor Act (45 U.S.C. secs. 151 through 164 (1982)) (RLA). The trial court denied defendant's motion but granted its motion to certify the question for interlocutory appeal pursuant to our Rule 308(a) (87 Ill. 2d R. 308(a)). The following issue was submitted for review:

> "Whether a railroad employee covered under the provisions of the Railroad [*sic*] Labor Act, 45 U.S.C. section 151 *et seq.* may bring an action in state court against his employer for wrongful discharge without first exhausting his administrative remedies available under the Railroad [*sic*] Labor Act."

A majority of the appellate court reversed the trial court and entered judgment dismissing plaintiff's complaint with prejudice. (123 Ill. App. 3d 1038.) In so deciding, the court did not address either the issue certified or

those briefed by the parties but relied instead on its decision in *Mouser v. Granite City Steel Division* (1984), 121 Ill. App. 3d 834, which held that the tort of retaliatory discharge was not available to an employee covered by a collective-bargaining agreement.

Plaintiff sought leave to appeal to this court. On leave to appeal, this court entered an order, under its supervisory authority, reversing the judgment of the appellate court and remanding the cause to the circuit court to proceed in conformity with *Midgett v. Sackett-Chicago, Inc.* (1984), 105 Ill. 2d 143. This order was predicated on the belief that our recent decision in *Midgett* was dispositive. See 101 Ill. 2d 566.

Defendant moved for reconsideration of the supervisory order. In its memorandum supporting the motion, defendant argued that the RLA preempts any State court adjudication of employment-based disputes between railroads and their employees, including an action for retaliatory discharge. Upon reconsideration, the following order was entered: "[T]he motion for reconsideration of the supervisory order entered in this cause on October 19, 1984, is allowed. Reconsideration of this case will be confined to the Federal preemption issue [and the collective-bargaining-agreement issue]."

The factual basis of plaintiff's claim began with an injury to his right knee sustained in January 1972. Plaintiff recovered and was certified as fit to return to work with defendant by his physician and defendant's physicians. In June 1972, plaintiff filed suit to recover damages for the knee injury pursuant to the Federal Employers' Liability Act (45 U.S.C. secs. 51 through 60 (1970)) (FELA), a Federal statute applicable to interstate railroads in their capacity as employers. FELA imposes liability on railroad employers for injuries to employees caused by an employer's negligence. (45 U.S.C. sec. 51 (1970).) This suit was tried to a verdict, but the record does not indicate which party prevailed on the verdict.

Plaintiff sustained a second work-related injury in December 1978. The injury was to his back. In the course of various medical examinations conducted by defendant's

physicians occasioned by this second injury, interest in plaintiff's earlier knee injury was revived.

A physician for defendant reported that he was more concerned about plaintiff's prior knee injury than he was about the recent back injury. In a report to defendant in April 1979, the physician noted that the knee had undergone "degenerative change." Thereafter, in December 1979, the chief medical officer for defendant permanently disqualified plaintiff from his position as a carman welder because of "degenerative changes in the right knee." Plaintiff was permanently disqualified even though his physician had reported that plaintiff had no disability from either the knee or back injuries which would restrict him in the performance of his duties.

One week after his permanent disqualification plaintiff filed a grievance pursuant to the terms of the collective-bargaining agreement in effect between his union and defendant. One month later, in January 1980, plaintiff filed a second suit under FELA in State court seeking recovery for his back injury. The record does not disclose the result of this second FELA action. Six months later, in July 1980, plaintiff filed the instant action.

In his complaint, plaintiff alleged that his permanent disqualification as a carman welder was in retaliation for having sued defendant under FELA. At the time plaintiff filed his action for retaliatory discharge the second suit under FELA and his grievance were pending. Plaintiff's grievance has since been resolved. The grievance was referred to the National Railroad Adjustment Board in February 1981 as provided by the RLA. Resolution was reached in July 1983 when plaintiff was ordered reinstated with retroactive seniority upon securing a favorable medical report from a jointly selected panel of three physicians. Plaintiff was reinstated with full seniority pursuant to this order in September 1983.

This record reveals that, within seven months of his permanent disqualification as a carman welder, plaintiff had initiated actions in three separate forums. Our present concern is with the last action taken, the suit for

retaliatory discharge. We address the limited issue presented: Does the RLA preempt an action for retaliatory discharge brought by an employee covered by the Act?

The leading case on the preemptive effect of the RLA is *Andrews v. Louisville & Nashville R.R. Co.* (1972), 406 U.S. 320, 32 L. Ed. 2d 95, 92 S. Ct. 1562. There the Supreme Court held that an employee who was not permitted to return to work by his employer after recovering from injuries sustained in an automobile accident could not maintain a suit in State court on a State-law contract claim for wrongful discharge. The court found that the RLA governed the dispute. The court also held that the RLA preempted State actions based on wrongful discharge and that the National Railroad Adjustment Board has exclusive jurisdiction to adjudicate all claims arising under the RLA.

Plaintiff attempts to distinguish his case from *Andrews* by pointing out that *Andrews* addressed *wrongful* rather than *retaliatory* discharge. He concedes that wrongful discharge is a claim grounded in the contract of employment, thereby falling within the exclusive jurisdiction of the RLA. However, plaintiff contends that his claim of retaliatory discharge is not a contractual action but, rather, a tort action. Because his action is in tort, plaintiff argues that *Andrews* is inapposite. We disagree. The court in *Andrews* made it clear that the preemptive effect of the RLA was not limited to contractual disputes. The court explained that "the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent *stems not from any contractual undertaking between the parties but from the Act itself.*" (Emphasis added.) 406 U.S. 320, 323, 32 L. Ed. 2d 95, 99, 92 S. Ct. 1562, 1565.

Moreover plaintiff's contention was recently rejected by the United States Court of Appeals for the Seventh Circuit, in *Jackson v. Consolidation Rail Corp.* (7th Cir. 1983), 717 F.2d 1045, 1049. There, as in the instant case, a railroad employee sought recovery on a State-law tort claim for retaliatory discharge, alleging that he was terminated for filing an action under the FELA. The plaintiff in

Jackson argued that *Andrews* was not controlling because *Andrews* applied to "wrongful" rather to "retaliatory" discharge. The court did not find this distinction persuasive, characterizing retaliatory discharge as merely one type of wrongful discharge. (717 F.2d 1045, 1049.) The court went on to note that the State-law claim was "identical to the claim he would have made, had he pursued the grievance through administrative channels." (717 F.2d 1045, 1054.) Because the State-law tort claim and any claim brought under the RLA would be the same claims, the court found *Andrews* controlling and expressly held that the RLA preempts a State-law tort action for retaliatory discharge premised on termination for having filed suit under the FELA. 717 F.2d 1045, 1051, 1056.

We agree with the Seventh Circuit's analysis and application of *Andrews*. We therefore hold that the RLA preempts our State-law tort action alleging retaliatory discharge for having filed suit under the FELA where, as here, it is brought by an employee covered by the RLA.

Plaintiff seeks to avoid the preemptive effect of the RLA by arguing that his case falls within the ambit of certain recognized exceptions to preemption. Specifically, he argues that preemption does not apply "where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters & Joiners of America* (1977), 430 U.S. 290, 302, 51 L. Ed. 2d 338, 351, 97 S. Ct. 1056, 1064.

Plaintiff's reliance on *Farmer* is misplaced. First, the *Farmer* exception to preemption, by its terms, applies to the preemptive effect of the National Labor Relations Act (430 U.S. 290, 292, 51 L. Ed. 2d 338, 345, 97 S. Ct. 1056, 1059), not to the RLA. Second, assuming the applicability of *Farmer* to the instant case, our reading of the RLA indicates that a State-law action for retaliatory discharge would "threaten undue interference with the federal regulatory scheme." The RLA is an elaborate and extensive administrative scheme. (45 U.S.C. secs. 151 through 164 (1982).) Under this scheme "disputes *** growing out of

grievances" are to be resolved in the first instance by the parties. If the parties are unsuccessful, the RLA provides that the dispute be referred to the National Railroad Adjustment Board for resolution. (45 U.S.C. sec. 153 First (i) (1982).) Decisions of the Adjustment Board are final and binding. (45 U.S.C. sec. 153 First (m) (1982).) Under the RLA, a party dissatisfied with a decision of the Adjustment Board may obtain limited review in Federal district court with appeal to the court of appeals. (45 U.S.C. sec. 153 First (q) (1982).) The RLA does not accord original jurisdiction over employment-related disputes to either Federal or State courts. Original, exclusive jurisdiction is given to the Adjustment Board. (45 U.S.C. sec. 153 First (i) (1982).) As noted above, jurisdiction over appeals from decisions of the Adjustment Board is given the Federal courts. 45 U.S.C. sec. 153 First (q) (1982).

Our review of the RLA indicates that plaintiff's suit for retaliatory discharge is precluded as an "undue interference" with the dispute-resolution scheme of the RLA. Stripped to its essentials, plaintiff's suit is a reformulation in tort of his grievance which, as the record shows, fell within the purview of the RLA. Allowing plaintiff's suit to proceed would allow a State court, applying State law, to resolve "disputes *** growing out of grievances." (45 U.S.C. sec. 153 First (i) (1982).) Certainly, this result would unduly interfere with the operation of the dispute-resolution machinery of the RLA. Therefore, even if *Farmer* applies to cases arising under the RLA, it is of no assistance to plaintiff.

A thorough reading of the RLA makes clear Congress' intent that employment-based disputes between parties covered by the RLA are to be resolved exclusively pursuant to the Act. Under the RLA, State courts have no jurisdiction to hear and resolve such disputes. (45 U.S.C. secs. 153 First (i), (q) (1982).) Because plaintiff's tort action for retaliatory discharge is, in essence, an employment-based dispute, we hold that it is preempted by the RLA.

For the reasons here stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.

NO. 60233

IN THE SUPREME COURT

OF THE STATE OF ILLINOIS

FRED A. KOEHLER,	)
	)
Appellant,	)
	)
vs.	)
	)
ILLINOIS CENTRAL GULF RAILROAD COMPANY,	)
	)
Appellee.	)

(Date Entered: February 4, 1986)

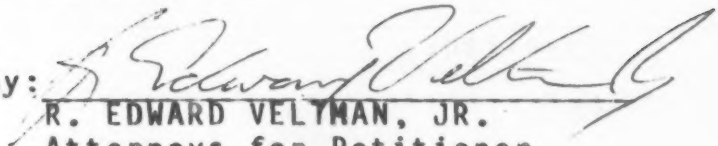
The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Goldenhersh, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 14, 1986.

Enclosed is a copy of Justice Simon's dissent.

Respectfully submitted,

CRAIN, COOKSEY, VELTMAN &
PURSELL, LTD.

By: 

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No. 85-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRED A. KOEHLER,
Petitioner,

vs.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Illinois

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement Of The Case	1
Summary Of Reasons For Denying Petition For Writ Of Certiorari	3
Reasons For Denying Petition For Writ Of Certiorari	3
I. This Court Has Settled The Issue Presented In This Case	3
II. The Decision Of The Supreme Court Of Illinois Does Not Conflict With Any Other Decision	6
Conclusion	9

TABLE OF AUTHORITIES

Page

Cases:

Allis-Chalmers Corp. v. Lueck, ____ U.S. ____, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) 5, 8

Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972) .... *passim*

Belknap, Inc. v. Hale, 463 U.S. 491, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983) 6

Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957) 3, 4

Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) 6, 7

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed.2d 233 (1984) 2, 4, 5, 7, 8

Landfried v. Terminal Railroad Association of St. Louis, 721 F.2d 254 (8th Cir. 1983), *cert. denied,* 466 U.S. 928, 104 S.Ct. 1712, 80 L.Ed.2d 185 (1984) 4

Midgett v. Sackett-Chicago, Inc., 105 Ill.2d 143, 473 N.E.2d 1280 (1984), *cert. denied,* ____ U.S. ____, 106 S.Ct. 278, 88 L.Ed.2d 243 (1985) 8

Minehart v. Louisville & Nashville Railroad Co., 731 F.2d 342 (6th Cir. 1984) 4

Raybourn v. Burlington Northern Railroad Co., 602 F. Supp. 385 (W.D. Mo. 1985) 6

Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978), *reh'g denied*, 439 U.S. 1135, 99 S.Ct. 1060, 59 L.Ed.2d 98 (1979) 3, 4

Walker v. Southern Railway Co., 385 U.S. 196, 87 S.Ct. 365, 17 L.Ed.2d 294 (1966) 3

Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1641, ____ L.Ed.2d ____ (1986) 8

Statutes:

Energy Reorganization Act, § 210, 42 U.S.C. § 5851 ... 8

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 .. 2

Labor Management Relations Act, § 301, 29 U.S.C. § 185(a) 5, 6

National Labor Relations Act, §§ 7 and 8, 29 U.S.C. §§ 157 and 158 7

Railway Labor Act, § 153 First(i), 45 U.S.C. § 153 First(i) ..... *passim*

No. 85-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRED A. KOEHLER,
Petitioner,

vs.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, a corporation,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Illinois

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner is a railroad employee covered by the Railway Labor Act (45 U.S.C. §§ 151-162) ("RLA"). On December 12, 1979, respondent's chief medical officer disqualified petitioner from employment based on petitioner's medical condition. Petitioner filed a grievance for wrongful discharge. After his grievance was denied at the first and second levels of the grievance procedures, petitioner presented his grievance to the National Railroad Adjustment Board ("NRAB") pursuant to

§ 153First(i) of the RLA and the terms of the collective bargaining agreement between his union and respondent. The NRAB ruled in favor of petitioner based on an opinion by a panel of three physicians that petitioner was able to return to work, and ordered respondent to reinstate petitioner with full retroactive seniority.

This action for wrongful discharge was filed in the Twentieth Judicial Circuit, St. Clair County, Illinois, prior to the NRAB's reinstatement of petitioner. Petitioner alleged in his complaint that he was discharged in retaliation for filing a claim under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60). The trial court denied respondent's motion to dismiss based on RLA preemption but certified its interlocutory order for review. The appellate court reversed the trial court on the basis that an employee covered by a collective bargaining agreement could not maintain an action for wrongful discharge. After a complicated procedural course, the Supreme Court of Illinois reviewed the issue certified by the trial court and determined that petitioner's retaliatory discharge claim was nothing more than a reformulation of his grievance. The Supreme Court of Illinois followed this Court's decision in *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 323-25, 92 S.Ct. 1562, 1565-66, 32 L.Ed.2d 95 (1972) and the Seventh Circuit's decision in *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1049 (7th Cir. 1983), *cert. denied,* 465 U.S. 1007, 104 S.Ct. 1000, 79 L.Ed.2d 233 (1984) and held that petitioner's wrongful discharge claim was preempted by the RLA and that his exclusive remedy was provided by that Act. *Koehler v. Illinois Central Gulf Railroad Co.*, ____ Ill.2d ____,____, 488 N.E.2d 542, 546 (1985).

SUMMARY OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

This Court held in *Andrews* that actions for wrongful discharge by railroad employees are preempted by § 153First(i) of the RLA. Every federal circuit that has considered this issue has held that an action in tort for retaliatory discharge by a railroad employee is preempted by that section, and no state or federal court has held otherwise.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. This Court Has Settled The Issue Presented In This Case.

Congress enacted the Railway Labor Act to promote stability in labor-management relations in the national railroad industry. *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 94, 99 S.Ct. 399, 402, 58 L.Ed. 2d 354 (1978), *reh'g denied,* 439 U.S. 1135, 99 S.Ct. 1060, 59 L.Ed. 2d 98 (1979). Among the provisions of the RLA designed to provide remedies for the resolution of disputes between railroads and their employees is 45 U.S.C. § 153First(i). Under § 153First(i), disputes between an employee and a railroad concerning the interpretation of the terms of a collective bargaining agreement are within the exclusive jurisdiction of the NRAB. *Andrews,* 406 U.S. at 325, 92 S.Ct. at 1565. The predecessor to the current § 153First(i) provided voluntary machinery to resolve these minor disputes. The failure of the voluntary machinery to resolve a large number of these minor disputes threatened to disrupt transportation "in this most important national industry." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.,* 353 U.S. 30, 40, 77 S.Ct. 635, 640, 1 L.Ed. 2d 622 (1957). To avoid interruption of interstate transportation by rail, Congress mandated that the parties submit their minor disputes to the NRAB for resolution. *Andrews,* 406 U.S. at 322, 92 S.Ct. at 1564; *Walker v. Southern Railway Co.,* 385 U.S. 196, 198, 87

S.Ct. 365, 366, 17 L.Ed. 2d 294 (1966). Congress considered it essential that these minor disputes be kept within the NRAB and out of the courts. *Sheehan,* 439 U.S. at 94, 99 S.Ct. at 402; *Trainmen,* 353 U.S. at 40, 77 S.Ct. at 640.

In *Andrews,* a railroad worker alleged that the defendant railroad had wrongfully discharged him when it refused to allow him to return to work following an automobile accident. This Court carefully considered the nature of wrongful discharge claims and their relationship to the clear Congressional intent embodied in the Railway Labor Act. This Court held:

> The fact that petitioner characterizes his claim as one for "wrongful discharge" does not save it from the Act's mandatory provisions for the processing of grievances. ... [T]he only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one that entitles him to damages, is the collective-bargaining agreement between the employer and the union. ... Thus petitioner's claim, and respondent's disallowance of it, stem from differing interpretations of the collective-bargaining agreement. ... His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment.

Andrews, 406 U.S. at 323-24, 92 S.Ct. at 1565.

Every federal circuit court that has considered this issue has held that § 153First(i) of the RLA preempts all retaliatory discharge actions by railroad employees against their employers. *Jackson,* 717 F.2d at 1054; *Landfried v. Terminal Railroad Association of St. Louis,* 721 F.2d 254, 255 (8th Cir. 1983), *cert. denied,* 466 U.S. 928, 104 S.Ct. 1712, 80 L.Ed.2d 185 (1984); *Minehart v. Louisville & Nashville Railroad Co.,* 731 F.2d 342, 344-45 (6th Cir. 1984). In *Jackson,* the Seventh Circuit reasoned that "retaliatory discharge" is one variety of "wrongful discharge" and rejected the argument petitioner asserts here that a railroad employee may avoid the exclusive administrative

remedy provided by the RLA because his retaliatory discharge claim implicates certain rights allegedly not arising from the collective-bargaining agreement. 717 F.2d at 1049-51. Respondent's determination that petitioner was medically disqualified from performing railroad work and petitioner's belief that he was unjustly dismissed "stem from differing interpretations of the collective-bargaining agreement." *See Andrews,* 406 U.S. at 324, 92 S.Ct. at 1565. Thus, irrespective of the label petitioner places on his wrongful discharge claim, the Congressional mandate that minor disputes be settled by the NRAB will be defeated if petitioner is permitted to relitigate this dispute in the state courts after it was properly settled by the NRAB.

This Court recently reiterated the principle that a party may not avoid exclusive federal administrative remedies for labor disputes by characterizing a grievance as a tort action. *Allis-Chalmers Corp. v. Lueck,* ____ U.S. ____, 105 S.Ct. 1904, 85 L.Ed. 2d 206 (1985). In *Lueck,* this Court held that the scope of the preemptive effect of § 301 of the Labor Management Relations Act (29 U.S.C. § 185(a)) ("LMRA") extended to tort suits which could have been brought as grievances. 105 S.Ct. at 1916.

The rationale of *Lueck* mandates the conclusion that § 153First(i) of the RLA preempts plaintiff's action for wrongful discharge. Section 301 of the LMRA provides voluntary machinery for the resolution of disputes arising out of the interpretation of collective-bargaining agreements similar to the voluntary dispute resolution machinery provided in the predecessor to § 153First(i) of the RLA. Congress amended § 153First(i) by replacing the *voluntary* administrative remedy with a *compulsory* administrative remedy. Thus, the importance of preempting state claims which interfere with federal administrative dispute resolution machinery is even stronger under the RLA than under the LMRA:

> Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act

> for [wrongful discharge] disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.

Andrews, 406 U.S. at 323, 92 S.Ct. at 1565. Since § 301 of the LMRA preempts tort suits which could have been brought as grievances, § 153First(i) of the RLA must preempt a tort action for wrongful discharge which was originally submitted to the NRAB as a minor dispute.

Petitioner cites only one case, *Raybourn v. Burlington Northern Railroad Co.,* 602 F. Supp. 385 (W.D. Mo. 1985), in which a tort action by a railroad employee was not preempted by the RLA. *Raybourn* has no application here. In that case plaintiff alleged false arrest and false imprisonment. *Raybourn* did not involve wrongful discharge. In fact, the *Raybourn* court agreed in dicta "that wrongful discharge cases are within the exclusive jurisdiction of the [Railway] Adjustment Board." 602 F. Supp. at 387 n.3.

II. The Decision Of The Supreme Court Of Illinois Does Not Conflict With Any Other Decision.

Petitioner argues that the decision of the Supreme Court of Illinois conflicts with decisions of this Court and other decisions of the Supreme Court of Illinois. None of the decisions discussed by petitioner concern the preemption of wrongful discharge claims of railroad workers under the RLA, and all of those decisions are consistent with the decision of the Supreme Court of Illinois in this case.

Petitioner suggests that the decision of the Supreme Court of Illinois in this case conflicts with *Belknap, Inc. v. Hale,* 463 U.S. 491, 103 S.Ct. 3172, 77 L.Ed. 2d 798 (1983) and *Farmer v. United Brotherhood of Carpenters and Joiners of America,*

Local 25, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed. 2d 338 (1977). Neither case is applicable to this case because both cases decided issues concerning preemption based on the primary jurisdiction of the National Labor Relations Board ("NLRB") to hear unfair labor practice charges under §§ 7 and 8 of the NLRA and not preemption based on the exclusive jurisdiction of the NRAB to resolve minor disputes between railroads and their employees.

The Supreme Court of Illinois properly recognized that the issue here is controlled by *Andrews* and other cases construing the preemptive effect of § 153First(i) of the RLA and not cases deciding the preemptive effect of §§ 7 and 8 of the NLRA. In *Jackson,* the Seventh Circuit distinguished the bases for preemption under the two statutes:

> [T]he difference between the impact of the NLRA and the RLA has significance. The focus of the NLRA is on specific conduct that Congress has deemed subject to either prohibition or protection, 29 U.S.C. §§ 157-158. Often, as illustrated by *Sears, [Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed. 2d 209 (1978)], it is the objective of certain conduct, rather than the mere existence thereof, that is relevant to determining whether actions are protected or prohibited by the NLRA. In contrast, the RLA has made any grievance arising out of the collective-bargaining agreement subject to the exclusive arbitral remedies contained in that Act, 45 U.S.C. § 153First(i). It follows from this difference that a state claim is more likely to impinge on an area of exclusive administrative jurisdiction under the RLA than under the NLRA.

717 F.2d at 1052.

Moreover, the Seventh Circuit and the Supreme Court of Illinois reasoned that even if *Farmer* were to apply to cases arising under the RLA, permitting petitioner to reformulate his

grievance as a tort action would "unduly interfere with the dispute-resolution machinery of the RLA." *Koehler,* 488 N.E.2d at 546, Petitioner's Appendix at 12; *see Jackson,* 717 F.2d at 1054.

Finally, petitioner suggests that the decision of the Supreme Court of Illinois in this case conflicts with *Wheeler v. Caterpillar Tractor Co.,* 108 Ill.2d 502, 485 N.E.2d 372 (1985), *cert. denied,* ____ U.S. ____, 106 S.Ct. 1641, ____ L.Ed.2d ____ (1986) and *Midgett v. Sackett-Chicago, Inc.,* 104 Ill.2d 143, 473 N.E.2d 1280 (1984), *cert. denied,* ____ U.S. ____, 106 S.Ct. 278, 88 L.Ed.2d 243 (1985) (Petition at 26). It is clear that no conflict exists. *Wheeler* addressed the issue of preemption based on § 210 of the Energy Reorganization Act (42 U.S.C. § 5851) and not preemption under the RLA. *Midgett* did not discuss the issue of preemption. Thus, neither decision could conflict with the court's decision here that § 153First(i) preempts a tort action by a railroad employee for retaliatory discharge.

Furthermore, this Court should not review this case based on petitioner's argument that the decision of the Supreme Court of Illinois conflicts with that court's decisions in *Wheeler* and *Midgett.* This argument is more properly addressed to the Supreme Court of Illinois, which rejected it when it denied petitioner's petition for rehearing. The writ of certiorari should not be used to review the Supreme Court of Illinois' determination that its decisions are consistent with one another. *See* Supreme Court Rule 17.1(b).

The decision of the Supreme Court of Illinois follows this Court's decision in *Andrews* and the uniform decisions of the circuit courts and is also in harmony with this Court's decision in *Lueck.* No reasons exist for this Court to review this case.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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